No. 12-10

IN THE

Supreme Court of the United States

AGENCY FOR INTERNATIONAL DEVELOPMENT, ET AL.,
Petitioners,

v.

ALLIANCE FOR OPEN SOCIETY INTERNATIONAL, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF DEANS AND PROFESSORS OF PUBLIC HEALTH AND ORGANIZATIONS WORKING IN PUBLIC HEALTH POLICY AND IMPLEMENTATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Amici curiae are deans and professors of public health and public health law, as well as organizations working in the public health sector, either by delivering public health services to individuals and communities or by advocating for public health policies. *Amici* include the deans of the leading public health schools in the United States, professors and other individuals that are internationally recognized for expertise in HIV/AIDS, and organizations at the forefront of the battle against HIV/AIDS. Individual *amici* are specifically identified with their statements of interest in an appendix to this brief.

Amici curiae are engaged in the policy and science of protecting and improving the health of communities through education, promotion of healthy lifestyles, and research for disease and injury prevention. *Amici* include organizations that are directly affected by the requirement set forth in the United States Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act of 2003 ("Leadership Act"), Pub. L. No. 108-25, 117 Stat. 711, that denies funding to any organization that does not "have a

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[1] A letter from Petitioners consenting to the filing of this brief is on file with the Clerk. A letter from Respondents consenting to the filing accompanies this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*'s counsel made a monetary contribution to the preparation or submission of this brief. Some *amici* are members of Respondent InterAction.

policy explicitly opposing prostitution" or to any organization that engages in speech or activities that the government deems inconsistent with an explicit opposition to prostitution. 22 U.S.C. § 7631(f). *Amici* believe that complying with this requirement will result in alienating the groups that public health organizations most need to reach and educate in order to achieve the goals set forth in the Leadership Act. Moreover, the prohibition on unspecified private speech and activities has a chilling effect that will preclude public health organizations, including some *amici*, from doing the work necessary to achieve the Leadership Act's goals.

SUMMARY OF ARGUMENT

The President's Emergency Plan for AIDS Relief (PEPFAR) is the largest commitment by any nation in history to combat disease. PEPFAR represents a massive infusion of funds into the public health sector—$48 billion over the current five-year authorization period. However, as set forth in the Leadership Act, access to PEPFAR funding is conditioned upon an organization "hav[ing] a policy explicitly opposing prostitution," and refraining from engaging in any speech or activities that the government deems to be "inconsistent with" that policy. 22 U.S.C. § 7631(f); Organizational Integrity of Entities That Are Implementing Programs and Activities Under the Leadership Act, 75 Fed. Reg. 18,760 (Apr. 13, 2010); *see also* 45 C.F.R. § 89.3. This requirement extends not only to what a recipient says or does with PEPFAR funds, but even to what an organization says or does with its own private funds. *See* 22 U.S.C. § 7631(f).

Although this anti-prostitution pledge requirement is embedded in PEPFAR's authorizing statute, the pledge has been largely unenforced against American non-governmental organizations ("NGOs"), in part because of the preliminary injunction granted by the district court in this case. Now, this Court is being asked whether the Constitution permits the pledge to be extracted from those NGOs in exchange for receiving PEPFAR funds. *Amici*—deans, professors, and organizations active in the field of public health—respectfully urge the Court to affirm the Second Circuit, allowing the marketplace of ideas to continue generating best practices in the fight against HIV/AIDS, regardless of ideology.

The public health field is empirically driven and depends upon access to information. When the marketplace of ideas in public health operates without ideological restrictions, researchers and organizations on the ground can work hand in hand to develop best practices and to disseminate information about those best practices. This free circulation of ideas is particularly critical in the fight against HIV/AIDS, where public health researchers have found that some of the most effective strategies for combating the disease involve actively engaging sex workers as partners in the fight. Enforcing the anti-prostitution pledge requirement would chill research, development, and discussion of some of these best practices because organizations accepting PEPFAR funding would fear even coming close to the line of saying or doing something "inconsistent" with a policy explicitly opposing prostitution. The pledge

requirement is not only antithetical to First Amendment values, but also undermines the Leadership Act's goal of eradicating HIV/AIDS.

ARGUMENT

I. The Anti-Prostitution Pledge Distorts the Marketplace of Ideas in Public Health.

As this Court recently held, the "First Amendment creates 'an open marketplace' in which differing ideas about political, economic, and social issues can compete freely for public acceptance without improper government interference." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2288 (2012). In that open marketplace, "[t]he government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves." *Id.* Yet that is exactly what the government has done in this case. By conditioning the receipt of PEPFAR funds on an organization's willingness to take the anti-prostitution pledge, the government is compelling organizations to espouse the government's position. As the Second Circuit held, the anti-prostitution pledge requirement in this case falls well beyond what this Court has previously upheld as a permissible funding condition.

Compelled speech is particularly dangerous in the context of public health. Determining the most effective ways to prevent and treat disease requires that differing viewpoints be expressed, different methods be tested, and different results be discussed. But the government is conditioning an organization's access to funding to prevent and treat HIV/AIDS on

a requirement that only one viewpoint be expressed, that some methods never be tested, and that certain results not be discussed. The dangers of distorting the marketplace of ideas in the field of public health by commandeering public health organizations to adopt and adhere to the government's position are enormous, and there are real-world consequences. This Court has previously rejected the government's attempts at such distortion of the marketplace of ideas and it should do so again here. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543 (2001) ("The private nature of the speech involved here, and the extent of [the] regulation of private expression, are indicated further by the circumstance that the Government seeks to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning.").

A. Public Health's Marketplace of Ideas Depends on a Diversity of Views.

The science-driven field of public health encompasses many disciplines—from epidemiology and biostatistics to medicine and nursing—and many times more perspectives, including those of academics, umbrella organizations, and NGOs on the ground. The methods used in public health are common to all applied sciences, but they take on a particular sense of urgency in the fight against HIV/AIDS, a global epidemic that claims 7,000 new infections every day.[2] Participants in the public

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[2] Henry J. Kaiser Family Foundation, Fact Sheet: The Global HIV/AIDS Epidemic (Dec. 2012), *available at* http://www.kff.org/hivaids/upload/3030-17.pdf.

health sector examine empirical data, form hypotheses, implement programs, and collect yet more data to refine their prevention and treatment strategies. Meanwhile, NGOs on the ground adopt "best practices," working to stem the spread of infection even as newer approaches are tested.

These characteristics mark public health as a marketplace of ideas, where diversity of opinion is not only inherent, but also essential to the results it generates. Like speech on matters of public concern more generally, debate over matters of public health functions best when it is "uninhibited, robust, and wide-open." *N. Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Indeed, the principles animating the field of public health are the same principles that underlie our constitutional democracy. The entire "theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.'" *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012) (plurality opinion) (citation omitted); *see id.* ("Society has the right and civic duty to engage in open, dynamic, rational discourse."). And the very "purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

The vitality of the marketplace of ideas in public health depends on attracting more voices, not fewer. At times ideas in public health may spark controversy,[3] or even draw derision.[4] But a steady

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[3] *See, e.g.*, David Brown, *GAO Criticizes Bush's AIDS Plan*,

infusion of new concepts is necessary to stay ahead of an epidemic. Congress recognized as much in passing the Leadership Act. Government alone cannot do the work. Rather, as Congress found, partnerships with NGOs are "critical to the success of ... efforts to combat HIV/AIDS," 22 U.S.C. §§ 7603(4), 7621(a)(4), because such partnerships result in "combining financial and other resources, scientific knowledge, and expertise," *id.* § 7621(a)(3).

This leveraging of public and private resources to increase scientific knowledge and expertise is just what has happened in the years since the Leadership Act was passed. For nearly a decade, NGOs have worked with the government to implement successful

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Wash. Post, Apr. 5, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/04/04/AR2006040401628.html (noting that PEPFAR's abstinence policies were "the most controversial aspect of the giant AIDS plan").

[4] *See, e.g.*, Papa Salif Sow & Steven Ward, *Reinventing the Condom*, Impatient Optimists (Bill & Melinda Gates Foundation Mar. 18, 2013), http://www.impatientoptimists.org/Posts/2013/03/Reinventing-The-Condom (describing a current initiative by the Gates Foundation which offers a monetary prize to develop a condom that men will want to use on a consistent basis—an initiative motivated in part by the fact that "[w]omen, particularly those in high risk groups such as commercial sex workers, often face difficulties negotiating condom use; the fact that the term 'condom negotiation' even exists and is so common in discussions about HIV prevention or reproductive health speaks to the central shortcoming of our current generation of condoms"); Dale Paddock, *Bill Gates Wants to Pay You $100,000 to Build a Condom that Feels Good, Man*, Gawker (Mar. 24, 2013, 10:45 AM), http://gawker.com/5992138/bill-gates-wants-to-pay-you-100000-to-build-a-condom-that-feels-good-man.

strategies in combating HIV/AIDS. Because of the preliminary injunction in this case, U.S.-based NGOs have done so without taking the anti-prostitution pledge. Thus, academics, umbrella organizations, and U.S. NGOs working on the ground have been free to engage in vigorous debate and practice on a wide array of issues, from the most promising avenues for HIV/AIDS research to the most effective ways to reach at-risk populations, including sex workers. The debate has taken place in a manner that privileges evidence over ideology and research methods over simplified assumptions.

As just one example of how the marketplace of ideas is working to generate best practices in the prevention and treatment of HIV/AIDS, several years ago, PEPFAR programs began integrating maternal and child health by creating a one-stop shop at many primary health care facilities. The idea spread such that a pregnant woman at a PEPFAR-funded clinic now routinely receives HIV counseling and testing, prevention of mother to child transmission measures if she is HIV-positive, and information on family planning. This has created a generation of women more educated and engaged in their pregnancies and more receptive to facility-based deliveries, resulting in healthier mothers, healthier children, and a marked improvement in the survival of both.[5] It has also created a model for

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[5] U.S. President's Emergency Plan for AIDS Relief, Examples of PEPFAR Platforms Strengthening the Effectiveness and Sustainability of Country Efforts on Health, *available at* http://www.pepfar.gov/documents/organization/176785.pdf.

delivering care that researchers continue to study to determine its effectiveness.[6]

Should the government begin to enforce the pledge against U.S.-based NGOs, their ability to speak freely and contribute to the debate about best practices in the fight against HIV/AIDS would be at risk. When the government requires that a condition of entry into a debate is the adoption of the government's position, it is obvious that the marketplace of ideas will become distorted. *See Legal Servs. Corp.*, 531 U.S. at 543; *see also Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831–32 (1995) (the contention that "debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways"). Here, the risk is magnified because the United States government, through PEPFAR and other programs, provides more than half of global funding for HIV/AIDS treatment and prevention by donor governments.[7] PEPFAR alone constitutes more than one fifth of total annual resources available for the fight against HIV/AIDS.[8] Thus, the

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[6] See, e.g., Gail Kennedy et al., *Systematic Review of Integration of Maternal, Neonatal, and Child Health and Nutrition, Family Planning and HIV* (United States Agency for International Development May 2011), *available at* http://www.ghtechproject.com/files/MNCHN-HIV%20FINAL%2012%2012%2011.pdf.

[7] Jennifer Kates, et al., *Financing the Response to AIDS in Low- and Middle- Income Countries: International Assistance from Donor Governments in 2010*, at 6 (Henry J. Kaiser Family Foundation & UNAIDS Aug. 2011), *available at* http://www.kff.org/hivaids/upload/7347-07.pdf.

[8] John Cohen, *The Great Funding Surge*, 321 Science 512, 514

danger of distortion has practical, real world consequences as it means potentially cutting off the main source of funding for research that has shown the most potential for reaching some of the most affected populations.

On the urgency of reaching sex workers in order to combat the spread of HIV/AIDS, the parties are in agreement. As the United States government itself acknowledges, evidence-based interventions to provide HIV services to sex workers are a "smart investment."[9] Different views remain, however, on the most effective means of curtailing the spread of HIV among sex workers. That diversity can be seen even in the briefs submitted in this case. While the government implies that there are only two possible opinions about prostitution—that an organization can either "promote or affirmatively condone" prostitution or "oppos[e]" it, *see* Pet. Br. at 37—that contention is belied by its own *amici*. The Coalition Against Trafficking in Women, et al., supporting Petitioners, argues for the partial *decriminalization* of prostitution, an approach in which criminal sanctions against sex workers are eliminated, though

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(2008).

[9] U.S. Dep't of State, *PEPFAR Blueprint: Creating an AIDS-Free Generation*, Nov. 2012, at 26 ("What does the term smart investments mean for PEPFAR? First, it means prioritizing interventions that science indicates will save the most lives as outlined in the previous chapter: Road Map to Saving Lives. Second, it means going where the virus is—targeting those key populations at most risk and in most need of HIV services. Third, it means maximizing the impact of each dollar invested."); *id.* at 29 (describing "sex workers" as a "key population").

penalties against clients still apply. *See* Brief of the Coalition Against Trafficking in Women, et al. at 23. *Amici* cite studies to argue that partial decriminalization "has proven effective" and helps to reduce sex trafficking. *Id.* However, the anti-prostitution pledge could foreclose the ability of organizations, ironically including the government's own *amici*, to argue their position because it could be perceived as inconsistent with the pledge. *See infra* p. 23.

As even the brief of its *amici* demonstrates, the issue is far more complicated than the government's overly simplistic formulation that an organization either "promote[s] or affirmatively condone[s]" prostitution or "oppos[es]" it. Pet. Br. at 37. Rather, the real public health issue is how best to stem the HIV/AIDS pandemic in one of the most vulnerable and affected populations—sex workers. To answer that question, the government is "expend[ing] funds to encourage a diversity of views from private speakers," about the best ways to engage and treat this population. *Rosenberger*, 515 U.S. at 834. Yet, the government would deny all funding to those private speakers who, even using exclusively private funds, take the view that the best way to engage and treat this population is to do so in a manner that does not explicitly oppose prostitution (a view that appears to be advocated at least in part even by the government's own *amici*). That is not permissible under the First Amendment.

B. The Public Health Marketplace Depends on the Right of the Public to Receive Information.

This Court has long recognized that the First Amendment protects not only the rights of the speaker, but also the rights of the audience to receive speech. *See, e.g., Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("[T]he Constitution protects the right to receive information and ideas."); *Red Lion Broad. Co.*, 395 U.S. at 390 ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here."); *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("It would be a barren marketplace of ideas that had only sellers and no buyers.").

This right to receive information is of particular importance in practical, science-based fields such as public health. Access to information is the very engine of empiricism. And that means access to *all* information, not just the information the government wants listeners to hear. Indeed, "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2671 (2011) (quoting *44 Liquormart v. Rhode Island*, 517 U.S. 484, 503 (1996) (opinion of Stevens, J.)).

Information sharing is the lifeblood of the public health community. NGOs that implement programs on the ground often do not have the time or resources to independently investigate competing views about the best way to access at-risk populations. Instead,

they take their cues from umbrella organizations whose resources are devoted to distilling the latest research and pointing out best practices. These umbrella organizations in turn depend on academics and researchers to aggregate data and publish studies on what is working and what is not working in the field.

This collaborative dynamic points to a central misconception in the government's brief. The effect of an organization's reluctant "choice" to endorse the government's viewpoint in exchange for PEPFAR funds cannot be confined to that organization. *Cf.* Pet. Br. at 17–19. If the grantee speaks publicly or otherwise shares its views, it necessarily cannot speak freely about public health issues that touch upon the issue of prostitution. The anti-prostitution pledge thus distorts the information that other organizations and academics use to formulate the best practices of the future. Conversely, the pledge and its effects can also mislead NGOs that may refuse PEPFAR funds for themselves, but look to a grantee for forthright guidance on best practices in HIV/AIDS prevention and treatment.

In a field where empirical conclusions should be prioritized over policy debates, the government's insistence that an entire organization must affirmatively adopt its viewpoint (even where funds could easily be segregated) is really an attempt by the government to co-opt some of the most credible institutions in the public health field and make it appear that no one disagrees with the government's viewpoint. And this boost to the credibility of the government's message comes at a cost to *amici*. An

organization that takes the anti-prostitution pledge in order to receive PEPFAR funding may well risk its own credibility, since listeners will be left to wonder whether the practices promoted by the organization are truly "best practices" or merely the practices that best comply with the government's viewpoint.

In sum, there is no question that government may make a value judgment favoring a particular public policy and may choose to promote that policy through its spending power. But the legitimacy of the government's ultimate goal does not empower the government to use means that are inconsistent with the First Amendment. The anti-prostitution pledge requirement crosses the line from a mere refusal to subsidize particular activities to an affirmative use of subsidies to compel speech endorsing one viewpoint and silencing another. The requirement constricts the speech available in the public health sphere, distorts the empirical process of gathering data and adapting best practices, and ultimately harms the very population that PEPFAR funds were meant to help. The regulations cannot be upheld under the First Amendment.

II. The Anti-Prostitution Pledge Hinders the Public Health Community from Achieving the Leadership Act's Goal of Eradicating HIV/AIDS.

The anti-prostitution pledge requirement is not just bad law. It is also bad policy. The requirement actually hinders the public health community from achieving the goals set forth in the Leadership Act. The purpose of that Act is to "to strengthen and

enhance United States leadership and the effectiveness of the United States response to the HIV/AIDS, tuberculosis, and malaria pandemics," by "providing increased resources" and "intensifying efforts to prevent HIV infection; ensure the continued support for, and expanded access to, treatment and care programs; enhance the effectiveness of prevention, treatment, and care programs; and address the particular vulnerabilities of girls and women." 22 U.S.C. § 7603, (2), (3)(A)–(D). Congress further required that PEPFAR participants respond to "evidence-based improvements and innovations in the prevention" of HIV/AIDS. 22 U.S.C. § 7611(a)(2)(C).

Each of these central purposes is stymied by the anti-prostitution pledge. First, the pledge thwarts the use of proven strategies in HIV/AIDS prevention that entail nonjudgmental approaches to sex workers, such as community empowerment and mobilization strategies that directly engage sex workers in the fight against HIV/AIDS. Second, the pledge chills all speech and activities that grantees fear could be perceived by the government as "inconsistent" with a policy explicitly opposing prostitution, thus preventing organizations from even trying out new approaches that may eventually prove effective in treating and preventing HIV/AIDS.

A. Proven Strategies in HIV/AIDS Prevention and Treatment Include Nonjudgmental Engagement with Sex Workers.

Sex workers are among the most marginalized populations in the world. In addition to facing

elevated levels of HIV infection, sex workers battle stigma, discrimination, and violence, factors that frustrate access to HIV/AIDS services. Many of the strategies that have proven effective in the fight against HIV/AIDS are those that address sex-worker stigma directly, including through the use of drop-in centers, peer educators, and programs that help sex workers gain the determination to negotiate consistent condom use with their clients. In the public health field, such strategies are often known as "community mobilization" or "empowerment" efforts.[10] For many NGOs, it is vital to their mission and success that they actively engage risk populations including sex workers. That requires not alienating them with views that actually do not reflect the organization's beliefs, informed by evidence and practice.

There is no question that the goals of the Leadership Act cannot be achieved without addressing the epidemic of HIV/AIDS in the sex worker population. The prevalence of HIV infection among female sex workers globally is 11.8 percent—13.5 times the prevalence of HIV infection among women generally.[11] In the regions PEPFAR focuses

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[10] *See, e.g.*, Karnataka Health Promotion Trust, *Evaluation of Community Mobilization and Empowerment in Relation to HIV Prevention Among Female Sex Workers in Karnataka State, South India*, 2012, *available at* http://strive.lshtm.ac.uk/system/files/attachments/KHPT%20Evaluation%20of%20Community%20Mobilization.pdf.

[11] World Bank, *The Global HIV Epidemics Among Sex Workers*, 10–11 (2013), *available at* http://www.worldbank.org/content/dam/Worldbank/document/GlobalHIVEpidemicsAmongSexWorkers.pdf.

on,[12] the figures are even graver. The prevalence of HIV infection among female sex workers in sub-Saharan Africa, for example, is a tragic 36.9 percent.[13] As these numbers graphically demonstrate, there is an urgent need to engage with sex workers if there is any hope of stemming the tide of the global HIV/AIDS epidemic.

Yet public health organizations face serious obstacles in engaging sex workers to obtain HIV/AIDS services, including prevention, testing, and treatment. According to UNAIDS—an organization that is statutorily exempted from taking the pledge—"In many countries, laws, policies, discriminatory practices, and stigmatizing social attitudes drive sex work underground, impeding efforts to reach sex workers and their clients with HIV prevention, treatment, care and support programmes. Sex workers frequently have insufficient access to adequate health services; male and female condoms and water-based lubricants; post-exposure prophylaxis following unprotected sex and rape; management of sexually transmitted infections, drug treatment and other harm reduction services; protection from violence and abusive work conditions; and social and legal support. Inadequate service access is often compounded by abuse from law enforcement officers." UNAIDS Guidance Note

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[12] *See PEPFAR World Activities* map, July 19, 2012, *available at* http://www.pepfar.gov/documents/organization/195542.pdf.

[13] World Bank, *The Global HIV Epidemics Among Sex Workers*, 2013, at 10, *available at* http://www.worldbank.org/content/dam/Worldbank/document/GlobalHIVEpidemicsAmongSexWorkers.pdf.

on HIV and Sex Work, 5 (2009–12) (footnote omitted).[14] These barriers are also acknowledged by the United States government: "Key populations (men who have sex with men (MSM), sex workers (SW), people who inject drugs (PWID)) typically have HIV prevalence rates that exceed those of the general population. However, stigma, discrimination and fear of violence or legal sanctions often undermine their access to health care, including HIV services. Breaking down these barriers is essential to achieving an AIDS-free generation." *PEPFAR Blueprint*, at 29.

Over the last decade—as PEPFAR's anti-prostitution pledge was stayed against U.S.-based NGOs and private funding sources joined the fight against HIV/AIDS overseas—U.S. NGOs have been able to experiment with strategies that combat stigma and discrimination among sex workers while providing desperately needed HIV/AIDS services.[15]

The Avahan India AIDS Initiative, funded by the Bill & Melinda Gates Foundation, implemented many of these strategies on an ambitious scale. *See* AIDSTAR-ONE, *The Avahan-India AIDS Initiative: Promising Approaches to Combination HIV Prevention Programming in Concentrated*

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[14] *See also* Fiona Scorgie, et al., *'We Are Despised in the Hospitals': Sex Workers' Experiences of Accessing Health Care in Four African Countries*, 15 Culture, Health & Sexuality: An Int'l J. for Res., Intervention & Care 450, 456–58, 461 (2013).

[15] Even with the preliminary injunction in place, U.S.-based NGOs that collaborate with foreign NGOs were still constrained in part by the pledge since the pledge has been enforced against foreign NGOs.

Epidemics, Mar. 2011. In addition to funding clinics and providing condoms, Avahan recruited sex workers to work as peer educators, paying them a stipend in an effort to reduce turnover. *Id.* at 2, 6–7. Avahan also facilitated community services such as crisis-response teams to address violence and harassment, including at the hands of police. *Id.* at 9. Research on these efforts has found a strong correlation between community mobilization and empowerment strategies and improved health and social outcomes, including a reduction in the incidence of sexually transmitted infections (STIs).[16]

Organizations explicitly exempted by the Leadership Act from the anti-prostitution pledge have also embraced best practices entailing nonjudgmental sex worker outreach. The World Health Organization, for example, "strong[ly] recommend[s]" community empowerment strategies as a means of HIV/AIDS prevention.[17]

That position is also advocated by the World Bank. A recent study by the World Bank found that

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[16] Karnataka Health Promotion Trust, *supra* note 9, at 25–27; *see also* Prabhakar Parimi et al., *Mobilising community collectivisation among female sex workers to promote STI service utilisation from the government healthcare system in Andhra Pradesh, India*, 66 J. Epidemiology & Community Health 62 (2012), *available at* http://jech.bmj.com/content/early/2012/04/05/jech-2011-200832.full.pdf.

[17] World Health Organization, *Prevention and Treatment of HIV and other Sexually Transmitted Infections for Sex Workers in Low- and Middle-income Countries: Recommendations for a Public Health Approach* (Dec. 2012), at 21, *available at* http://apps.who.int/iris/bitstream/10665/77745/1/9789241504744_eng.pdf.

"[e]xpanding a community empowerment-based approach to comprehensive HIV prevention intervention among sex workers has demonstrable impact on the HIV epidemics among female sex workers, cumulatively averting up to 10,800 infections among sex workers across epidemic scenarios within a five-year time span" and averting up to an additional 20,700 infections in the general adult population during that same timeframe.[18] That same study also found that "[w]here sex worker organizations have partnered with government actors, the response to HIV among sex workers has been particularly effective and sustainable."[19] And it concluded with a recommendation that that future research into this area allow sex worker organizations to more meaningfully participate in the decision-making process regarding the research itself.

Similarly, a recent report of the UNAIDS Advisory Group noted that "[e]fforts to empower sex workers as a way of improving difficult working conditions have resulted in measurable improvements in sex workers' quality of life, self-confidence and agency. Studies have documented good social and economic outcomes, increased social capital, [and] high rates of condom use."[20] The report recommended that policymakers "[s]upport the development of sex worker-led organisations that

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[18] *Global HIV Epidemics Among Sex Workers*, *supra* note 13, at xxvii-xxviii.

[19] *Id.* at xxxii.

[20] Report of the UNAIDS Advisory Group on HIV and Sex Work, Dec. 2011, at 22.

advocate for, and implement, programmes to reduce sex workers' economic and social vulnerability," and specifically cautioned that policymakers should "[e]nsure that access to economic empowerment programmes is not conditional on leaving sex work or reducing involvement in sex work."[21]

As these studies demonstrate, directly engaging and empowering sex workers in the fight against HIV/AIDS has proven tremendously successful. Yet if the pledge goes into effect, U.S.-based NGOs would likely be precluded from engaging in any of these strategies. The pledge would therefore undermine the very goals the Leadership Act is trying to advance.

B. The Anti-Prostitution Pledge Threatens to Chill The Use of Best Practices by U.S. Organizations.

Plainly an organization may not use PEPFAR funds to advocate the legalization of prostitution, and neither Respondents nor *amici* contend otherwise. But beyond this prohibition, it is not entirely clear what speech or strategies an organization can engage in without running afoul of the governmental requirement that an organization not do anything "inconsistent" with an explicit policy opposing prostitution.[22] Consequently, enforcing the

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[21] *Id.* at 24–25.

[22] *See* Melissa Hope Ditmore & Dan Allman, *An Analysis of the Implementation of PEPFAR's Anti-Prostitution Pledge and Its Implications for Successful HIV Prevention Among Organizations Working with Sex Workers*, J. of the Int'l AIDS Soc'y, 2013, at 8, *available at* http://www.jiasociety.org/index.php/jias/article/view/17354/2894 ("Specific activities

pledge requirement threatens to chill the speech and activities of organizations engaged in the very strategies that have thus far proven effective in engaging sex workers in the fight against HIV/AIDS.

Because organizations that take the pledge are not only at risk of losing future PEPFAR funding, but may also have to pay back past PEPFAR funding,[23] organizations will likely not come anywhere close to the line of perceived "inconsistency" with an anti-prostitution stance. "The mere potential for the exercise of [governmental] power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom." *Alvarez*, 132 S. Ct. at 2548 (plurality opinion); *see also Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 621 (1998) (Souter, J., dissenting) ("We have explained before that the prospect of a denial of government funding necessarily carries with it the potential to 'chil[l] ...

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prohibited by this restriction have never been defined; rather, guidance has been vague. This vagueness has led to arbitrary and unsystematic interpretations of the pledge, contributing to self-censorship by grant recipients.").

[23] *See, e.g.*, Doshi Sheetal, *Sex Workers on the Front Lines of Prevention*, International Consortium of Investigative Journalists, a Project of the Center for Public Integrity (Nov. 30, 2006), *available at* http://www.icij.org/projects/divine-intervention/sex-workers-front-line-prevention (describing how a settlement between the U.S. government and foreign NGO SANGRAM over its refusal to sign the pledge led to SANGRAM voluntarily returning a portion of the disputed grant that had already been disbursed).

individual thought and expression.'") (alterations in original) (citation omitted).

Outright advocacy for a change in prostitution's legal status hardly represents the outer reaches of the anti-prostitution pledge. The anti-prostitution pledge requirement would equally chill ambivalent statements predicting that "[t]he legalization of prostitution . . . is likely to make things better for women who have too few options to begin with." *See* Martha C. Nussbaum, *Sex and Social Justice* 278 (Oxford Univ. Press 1999). It would likely foreclose the advocacy of one of the government's own *amici* for the reduction of penalties on prostitutes themselves. *See supra* p. 11. And it would seem to create significant tensions with factual observations that the PEPFAR program itself has published.[24]

Because engaging in potentially "inconsistent" speech can decimate the budget of an NGO and bring unwanted political attention, chilling effects are inevitable. Indeed, research suggests that scientists often engage in self-censorship when their funding is threatened by political controversy. *See* Joanna Kempner, *The Chilling Effect: How Do Researchers React to Controversy?*, 5 PLoS Med. 1571 (2008). This study interviewed scientists whose NIH grants for analyzing aspects of sexual behavior or drug use

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[24] *See PEPFAR Blueprint*, at 29 ("[S]ex workers [and other marginalized groups] typically have HIV prevalence rates that exceed those of the general population. However, stigma, discrimination and *fear of* violence or *legal sanctions* often undermine their access to health care, including HIV services. *Breaking down these barriers is essential to achieving an AIDS-free generation.*" (emphasis added)).

(many related to HIV/AIDS) were the focus of a minor political controversy that began on the floors of Congress. None of the researchers' grants were withdrawn as a result of the controversy, but several years later, a majority of the respondents either strongly agreed or agreed with the statement that the "political controversy created a 'chilling effect' in research, dissuading scientists from studying controversial research." *Id.* at 1574. Half responded to the controversy by removing "red flag" words such as "sexual intercourse," "sex workers," and "harm-reduction" from titles and abstracts. *Id.* at 1575. Others abandoned lines of research for fear funding would be eliminated, and a few interviewees left scientific research altogether. *Id.* at 1575–76.

The fate of U.S. organizations under the anti-prostitution pledge may well follow the ominous precedent set by foreign organizations, which have been subject to the pledge requirement from the beginning. Indeed, U.S. organizations that collaborate with foreign organizations have already felt the chilling effects of the pledge as any international collaboration is necessarily constrained by the foreign organization's obligation not to be perceived as doing anything "inconsistent" with an anti-prostitution stance.

As just one example of the pledge's effects, in the early 2000s, Doctors without Borders embarked on a community empowerment approach to HIV/AIDS prevention among sex workers in a red-light district in Svay Pak, outside of Phnom Penh, Cambodia.[25]

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[25] *See* Joanna Busza, *Having the Rug Pulled from Under Your*

The program included a primary health clinic, condom distribution, and a drop-in center where sex workers could learn English and basic computing skills. After the pledge went into effect, "[p]ressure increased to avoid being seen to condone or promote prostitution" and "this threatened the project's ability to respond appropriately to changing circumstances in Svay Pak."[26] The project eventually closed down as it could no longer effectively serve its population. This is just one example of how "affected organizations are likely to take a low profile rather than confront donors and risk sudden loss of funds."[27]

Other foreign organizations have abandoned projects when they learned the funding would be conditioned on an anti-prostitution pledge. In one well-documented example, the organization SANGRAM, which works to address HIV/AIDS in rural parts of India where HIV prevalence levels are among the highest, returned its PEPFAR funding rather than sign the pledge, reversing a planned expansion of its peer education and condom distribution program.[28] SANGRAM determined that accepting PEPFAR funds would put at risk its

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Feet: One Project's Experience of the US Policy Reversal on Sex Work, 21 Health Pol'y & Planning 329 (2006).

[26] *Id.* at 331.

[27] *Id.*

[28] Center for Health & Gender Equity, *Policy Brief: Implications of U.S. Policy Restrictions for HIV Programs Aimed at Commercial Sex Workers*, Aug. 2008, at 3; *see also* Priya Shetty, *Profile: Meena Saraswhati Seshu: Tackling HIV for India's Sex Workers*, 376 Lancet 17, 17 (2010).

strategy of engaging sex workers as agents of change for the community.

In addition, the pledge may deter organizations from pursuing HIV/AIDS interventions in nations where criminal sanctions for prostitution have been removed. Famously, Brazil rejected $40 million in HIV/AIDS funding from the United States precisely because it would not agree to the prostitution pledge.[29] U.S. NGOs are most effective when they do not unnecessarily provoke their host countries, but adopting the anti-prostitution pledge may have just that effect in Brazil and other countries where the legal status of prostitution differs from its status in the United States.

Recent research examining the impact of the anti-prostitution pledge among foreign NGOs has concluded that "[a]s a result of the pledge, in many instances information sharing about successful programming with sex workers has nearly ceased. Sex work programming has become a taboo topic [. . .] The anti-prostitution pledge has prevented the sharing of information about successful programming and prevented scaling up successful operations."[30]

The drastic, organization-wide consequences for engaging in activities deemed "inconsistent" with the

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[29] *See* Michael M. Phillips & Matt Moffett, *Brazil Refuses U.S. Aids Funds, Rejects Conditions*, Wall St. J., May 2, 2005, at A3 (May 2, 2005) (noting that "[p]rostitution isn't a crime in Brazil, and prostitutes' associations are among the most active groups engaged in anti-AIDS work").

[30] Ditmore & Allman, *supra* note 22, at 11.

anti-prostitution pledge inevitably heightens the risk that the fight to eradicate HIV/AIDS—and the exchange of ideas toward that effort—will be chilled. Neither the objectives of the Leadership Act nor the First Amendment permit that result.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

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